United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-1311

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs-Appellees-Appellants,

-aganist-

HOWARD H. CALLAWAY, individually and as Secretary of the Army, Department of Defense, U.S.A., LT. GENERAL WILLIAM C. GRIBBLE, JR., individually and as Chief of Engineers, Corps of Engineers and COL. HARRY W. LOMBARD, individually and as District Engineer, New York District, Corps of Engineers, U.S. Army,

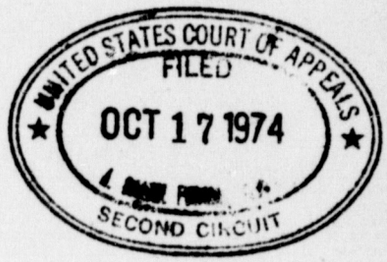
Defendants-Appellees,

-and-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant-Appellant.

Case No.
74-1311



PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC OF SCENIC HUDSON PRESERVATION CONFERENCE, et al.

BERLE, BUTZEL & KASS
Attorneys for Scenic Hudson
Preservation Conference, et al.
425 Park Avenue
New York, New York 10022

ALBERT K. BUTZEL
PETER J. MILLOCK
ANGUS MACBETH
Of Counsel

LAW OFFICES
BERLE, BUTZEL & KASS
425 PARK AVENUE
NEW YORK, NEW YORK 10022

PETER A. A. BERLE
ALBERT K. BUTZEL
STEPHEN L. KASS
PETER J. MILLOCK

838-2700
AREA CODE 212

October 15, 1974

Mr. A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
U.S. Courthouse
Foley Square
New York, New York 10007

Re: Scenic Hudson, et al. v. Howard H. Callaway, et al. and Con Edison; Case Nos. 74-1311, 74-1421

Dear Mr. Fusaro:

On behalf of the plaintiffs in the above action, I enclose herewith 25 copies of a petition for rehearing and suggestion for rehearing in banc of the Court's September 30, 1974 ruling in which plaintiffs were denied the award of attorneys' fees. Two copies of the petition have also been sent today to counsel for the government and Con Ed as reflected on the certificate of service which is attached at the back of the original petition.

Very truly yours,
BERLE, BUTZEL & KASS

Albert K. Butzel

Albert K. Butzel

Enclosures

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SCENIC HUDSON PRESERVATION CONFERENCE, THE HUDSON RIVER FISHERMEN'S ASSOCIATION, INC., THE SIERRA CLUB and its ATLANTIC CHAPTER, and THOMAS R. LAKE,

Plaintiffs-Appellees-Appellants,

-against-

HOWARD H. CALLAWAY, individually and as Secretary of the Army, Department of Defense, U.S.A., LT. GENERAL WILLIAM C. GRIBBLE, JR., individually and as Chief of Engineers, Corps of Engineers and COL. HARRY W. LOMBARD, individually and as District Engineer, New York District, Corps of Engineers, U.S. Army,

Defendants-Appellees,

-and-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant-Appellant.

Cargo Nos.
74-1311
74-1421

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC OF SCENIC HUDSON PRESERVATION CONFERENCE, et al.

By order issued September 30, 1974, this Court, per Judges Friendly and Moore, with Judge Feinberg dissenting, ruled that "in the exercise of discretion", plaintiffs were not entitled to the award of attorneys' fees in this Court. The ruling itself followed the decision of this Court in June 1974, upholding plaintiffs' claim that Consolidated Edison Company was required to obtain a permit under the Fed-

eral Water Pollution Control Act before it could fill some 40 acres of the Hudson River in connection with its Storm King plant. The Water Pollution Control Act authorizes the award of attorneys' fees; and this Court, as well as others elsewhere, had previously concluded that attorneys' fees in environmental cases may also be awarded on equitable grounds. Nonetheless, in this case, the majority decided against allowing reinbursement.

Normally, where, as here, fees are denied "in the exercise of discretion", there would be little purpose or basis for seeking rehearing of the ruling. In this instance, however, we believe that there are two compelling reasons why the full Court should review the September 30 ruling. First, it appears to run counter to an earlier decision by another panel of the Court -- in Hudson River Fishermen's Association v. FPC, 465 F.2d 519 (1974) -- wherein attorneys' fees were awarded to two of the same plaintiffs seeking such relief in this case [Order of August 6, 1974, in Case. No. 73-2258, awarding fees to Scenic Hudson and the Hudson River Fishermen]; and second, in view of the fact that the Federal Water Pollution Control Act authorizes the award of fees in support of citizen enforcement actions, it is a matter of substantial importance that standards be established to provide guidance to future potential plaintiffs and attorneys.

For the foregoing reasons and others set forth below, plaintiffs now move, pursuant to Rule 40, Fed.R.App.Proc.,

for rehearing of the September 30, 1974 order and respectfully suggest that the matter be heard in banc pursuant to Rule 35, Fed.R.App.Proc.

Summary of the Case and The Decision on the Merits

In the early summer of 1973, Con Edison announced that it would shortly begin construction of its controversial Storm King project. At the time, however, the company had not obtained permits from the U.S. Army Corps of Engineers to dredge and fill in the Hudson in connection with the plant. In particular, Con Ed had not obtained a Corps permit under Section 10 of the Rivers and Harbors Act of 1899 [33 U.S.C. §403] to undertake dredging in the River; nor had it applied for a permit under Section 404 of the Federal Water Pollution Control Act [33 U.S.C. §1344] to dump, as it proposed, some 47,000,000 cubic feet of waste rock and other fill material into the River.*

As early as January 1973, plaintiffs had written to the Corps asking that it hold Con Edison to compliance with the applicable law and require permits for the dredging and dumping activities at Storm King. The Corps, however, had

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* Section 404 was enacted in October 1972, as a part of a broadscale reworking of Federal water pollution control laws. The basic theme of the reworking was that no one had a right to pollute and that no discharges into the country's waters would be allowed except as expressly authorized by permits issued under the Act. In seeking to proceed without a 404 permit, Con Ed sought to avoid this "no discharge" tenet.

responded by stating that there were no such requirements and that Con Ed was not obligated to obtain permits either under Section 10 or Section 404.

Faced with the Corps' inaction and Con Edison's announced plans to begin construction shortly, plaintiffs initiated this action in October 1973, seeking declaratory relief against the Corps and an injunction against Con Edison's massive dumping operations. Shortly after the summons and complaint were served, the Corps reversed its position as to the Section 404 permit and joined plaintiffs in asserting its necessity. Needless to say, Con Edison did not agree and moved for summary judgment dismissing all of plaintiffs' claims. Plaintiffs, in turn, cross moved for summary judgment -- both as to Section 10 and Section 404.

On December 28, 1973, the District Court, by Judge Lasker, upheld plaintiffs' claim that a Section 404 permit was required, and granted injunctive relief against con Ed's proposed dumping operations. By the same opinion, the District Court concluded that a Section 10 permit was not required, but with injunctive relief following from the 404 decision, this made little practical difference.

On March 4, 1974, Con Edison appealed Judge Lasker's 404 decision, and several days later plaintiffs filed a cross appeal on the Section 10 ruling. The cross-appeals were argued on May 31, 1974 and two weeks later, by per curiam opinion issued on June 11, 1974, this Court affirmed Judge Lasker's

decision in all respects. Thus the relief that had been granted in the District Court -- enjoining Con Ed from filling the Hudson at Storm King unless and until it obtained a Section 404 permit -- was upheld.

Motion for Attorneys' Fees

On June 26, 1974, plaintiffs filed with this Court a motion seeking the award of the attorneys' fees they had incurred in connection with the appeal of Judge Lasker's decision. The relief was sought solely against Con Edison, since the company, not the government, had forced the appeal and plaintiffs' defense thereof. The total amount asked for was $3,855, representing 73 hours of partners' time charged at $45 an hour, and 19 hours of associates' time charged at $30 an hour.

On July 1, 1974, Con Edison filed a memorandum in opposition to plaintiffs' motion, with plaintiffs' filing a response a few days later. On September 30, the Court issued its ruling denying the motion in the following language:

> " ... Plaintiffs having moved for the award of attorneys' fees against Consolidated Edison Company, the court rules that, whether or not it would have power to make such an award, the motion is denied in the exercise of discretion."

To which Judge Feinberg added: "I dissent." Plaintiffs now seek rehearing and suggest rehearing in banc in the belief that Judge Feinberg's views were correct and that where,

as here, citizens have succeeded in vindicating an important Congressional policy, attorneys' fees should be allowed.

POINT ONE

ATTORNEYS' FEES SHOULD BE GRANTED ON EQUITABLE GROUNDS WHERE PLAINTIFFS, ACTING AS PRIVATE ATTORNEYS GENERAL, VINDICATE IMPORTANT PUBLIC POLICIES

When Congress passed the comprehensive Federal Water Pollution Control Act Amendments of 1972 (hereinafter the "Water Amendments"), it established a new and fundamental national policy for water quality control -- to wit, that no one has the right to pollute and that no discharges of any kind can be made into the Nation's waters except in accordance with permits issued under the amended Act [Senate Report No. 92-414 (to accompany S. 2770), 1972 U.S. Code, Cong. & Admin. News, pp. 3708-09 (92nd Cong., 2d Sess.)]. Section 404 constituted (and constitutes) an essential part of this statutory scheme, providing the exclusive means for controlling discharges of dredged and fill material into navigable waters; and in emphasis of the destrictive potential of such activities, Congress not only required permits for the Corps [Section 404(a)], but gave the Environmental Protection Agency a veto power over any such discharges where they would result in unacceptable environmental impacts, including untoward effects of nursery and spawning grounds [Section 404(b), (c)].

Con Edison's massive filling operations at Storm King

involving 40 acres of the River and including admitted nursery areas along the shore*, threatened exactly the type of damage for which Congress had expressed its concern in enacting the Water Amendments and Section 404. Notwithstanding this situation, the Corps did not seek to require a permit application from Con Ed but, to the contrary, even after plaintiffs had written, discounted the need. Thus before plaintiffs commenced this action, Con Edison was in a position to proceed freely with its filling in spite of the Congressional mandate and without objection from the agency entrusted with the regulatory responsibility.

When plaintiffs initiated their action in he District Court, they were, then, acting not only to protect resources of the Hudson to which they had a long-standing personal commitment, but also in an effort to vindicate specific Congressional policies -- to wit, the anti-pollution provisions of the Water Amendments. In this they proved successful when Judge Lasker concluded that a Section 404 permit was prerequisite and enjoined the filling operations; and their efforts were fully vindicated when, after Con Edison forced the appeal, this Court affirmed Judge Lasker's decision in all respects.

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* After the District Court decision, Con Edison actually applied for a Section 404 permit, and in response to the notice, both the Interior Department and the National Marine Fisheries Service wrote in objections because of the spawning and nursery areas that would be filled. Con Ed has itself made the same concession in a report filed in support of the 404 application.

As a result, Con Edison is not free, as it otherwise would have been absent this action, to dump its wastes heedless of the Congressional directives.

Plaintiff moved to recover attorneys' fees against Con Edison on the grounds that while they initiated this suit to protect fisheries resources in which they had a special interest, they acted as well as private attorneys general seeking to enforce an important Congressional directive. In this regard, after all, were it not for plaintiffs' suit, Con Edison might already have dumped huge amounts of waste rock and other materials into the Hudson, covering over nursery and spawning grounds and otherwise demeaning the River, without a Corps permit or any EPA review. Such dumping, as the District Court found, would have directly contravened the Water Amendments, the primary purpose of which was and is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." Plaintiffs prevented this by their suit in the District Court; and in this Court, forced by Con Edison's appeal, plaintiffs again asserted successfully, on this Court's affirmance, that Congress meant what it said and that the dumping of pollutants in the Hudson could not be undertaken absent a Section 404 permit.

The policies and interests that plaintiffs forwarded were then, we submit, public policies and public interests defined not by plaintiffs, but by Congress; and in these circumstances, courts have increasingly recognized that the award of attorneys' fees is appropriate. Thus in La Raza

Unida v. Volpe, 57 F.R.D. 94 (N.D. Calif., 1973), the court awarded attorneys' fees to successful challengers of a highway project on the basis of the "private attorney general" rule:

> "[T]he rule briefly stated is that whenever there is nothing in a statutory scheme which might be interpreted as precluding it, a 'private attorney general' should be awarded attorneys' fees when it has effectuated a strong congressional policy which has benefitted a large class of people, or where further, the necessity and financial burden of private enforcement are such as to make the award essential." [57 F.R.D. at 98]

Plaintiffs fulfilled each of the requirements thus described. The strong Congressional policy that has been effectuated is the central policy of the Water Amendments themselves -- namely, that every effort must be made to restore and maintain the "integrity" of the Nation's waters and that to this end, no one any longer has the right to pollute [see Sections 101(a) and 301(a), 33 U.S.C. §§1251(a), 1311(a); and Senate Report No. 92-414, supra]. The interests that have been vindicated are, moreover, public rather than personal ones, and the number of persons who benefit include all who use the Hudson for recreation, as well as commercial fishermen in New York and elsewhere who depend on a healthy River for their livelihood and well-being. As to the necessity and financial burden of private enforcement, the unwillingness of the Corps to enforce compliance with the Water Amendments until this action was brought is proof of the former; and the financial burdens are reflected by

the recovery here being sought which, even at "public interest" rates comes to nearly $4,000.

A number of other cases are in accord with La Raza in authorizing the award of attorneys' fees to private attorneys general who have vindicated Congressional policies. For example, in Wilderness Society v. Morton, ___ F. 2d ___, 6 ERC 1427 (D.C. Cir. 1974), attorneys' fees were awarded in the Alaskan pipeline case (even though the law was subsequently changed), with the Court expressly noting that:

> "Where the law relies on private suits to effectuate congressional policy in favor of broad public interests, attorneys' fees are often necessary to ensure that private litigants will initiate such suits." [6 ERC at 1429].

Similarly, in Sierra Club v. Lynn, 364 F.Supp. 834 (W.D. Tex. 1973), attorneys' fees of $20,000 were awarded to the plaintiff, even though it had not prevailed in obtaining an injunction, because of the public service it had performed in drawing attention to possible water pollution associated with a construction project. In the instant action, plaintiffs have in fact obtained an injunction, and in connection with a construction project far larger, and a water resource of equal, if not greater, importance, than that involved in Lynn.

Finally, this Court has itself awarded attorneys' fees on what appear to be similar equitable grounds. Thus, in Hudson River Fishermen's Association v. FPC, fees aggregating $4,900 were awarded to the Fishermen and Scenic Hudson

where an action brought by them resulted in a remand for further hearings on dangers to the fisheries. Similar dangers are, of course, presented by the filling proposals in this case -- dangers that would have been glossed over without any consideration at all, contrary to express Congressional directives, had it not been for plaintiffs' efforts.

In light of the cases cited above, as well as the case law that has developed in other public interest areas [e.g., Hall v. Cole, 412 U.S. 1, 4 (1973); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Sims v. Amos, 340 F.Supp. 691 (M.D. Ala. 1972); Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971); Office of Communication of the United Church of Christ v. FCC, 465 F.2d 519 (D.C. Cir. 1972)], it would clearly appear that an award of attorneys' fees in the instant case was appropriate. Yet, "in the exercise of discretion", such an award has been denied. But on what basis, we must ask, in light of awards made previously by this and other courts?

Here, after all, plaintiffs succeeded in vindicating and enforcing an express Congressional policy and directive set forth in Section 404; and had they not done so, there is no doubt that the law, and the protections it is intended to afford, would have gone by the boards. There is, as a consequence, no ambiguity here: Congress, not plaintiffs, defined the desired goal, and however self-interested, plaintiffs vindicated a public policy through the action they brought. Under these circumstances, where plaintiffs were successful

and where a Congressional directive was enforced as a result, the majority's "exercise of discretion" is difficult to comprehend. Indeed, if these circumstances do not justify the award of attorneys' fees, then it is hard to imagine a case where fees could be deemed appropriate.

It may be, of course, that the majority rested its conclusion on the fact that there were cross appeals in this case and that plaintiffs prevailed only in respect of Section 404. But that fact in no way diminishes the very real and important policies that plaintiffs succeeded in vindicating -- policies that lie at the heart of the Nation's newly established anti-water pollution programs. Furthermore, the Section 10 issue was one of importance that had never been ruled upon previously by the courts; and even though plaintiffs did not prevail in this claim, the clarification of the law was, we submit, not without value.*

In summary, then, in light of the precedents in this and other courts, and in view of plaintiffs' success here in enforcing important Congressional directives, we respectfully submit that this Court should, in the exercise of its equitable powers, and contrary to the majority's ruling, authorize the award of fees here and, at the same time (and by so deciding), clarify the standards governing fee awards in envirnomental protection cases.

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* It is also worth noting that fee awards have been made by other courts where plaintiffs prevailed only in part [NRDC v. EPA, 484 F.2d 1331 (1st Cir. 1973)], where plaintiffs were unsuccessful [Sierra Club v. Lynn, supra], and even where Congress subsequently overrode the results obtained [Wilderness Society v. Morton, supra].

POINT TWO

ATTORNEYS' FEES ARE ALSO APPROPRIATE UNDER THE WATER AMENDMENTS

This Court, we believe, has the clear authority, in the exercise of its equitable powers, to award attorneys' fees in this appeal, as Wilderness Society and the other cases cited above indicate. Indeed, the case is even stronger here; for unlike Wilderness Society and the other cited precedents, where there was no immediate expression of legislative intent, Congress has clearly indicated in the Water Amendments that the award of attorneys' fees is appropriate in circumstances such as those involved here. Thus, Section 505 of the Water Amendments openly contemplates enforcement actions by citizens acting as private citizens; and in Section 505(d) [33 U.S.C. §1364(d)], the award of costs, including reasonable attorneys' fees, is expressly sanctioned "whenever the court determines such award is appropriate." That this authorization was not regarded lightly is underscored by the Senate Report on the Water Amendments, commenting as follows:

> "The Courts should recognize that in bringing legitimate actions under this section [505], citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party." [Senate Report No. 92-414, supra, 1972 U.S. Code, Congress & Admin. News, p. 3747] (emphasis added).

The instant case was not brought under Section 505 because the violation was imminent, rather than actual, and because the Corps itself was in default. However, the ef-

fect of the suit was to exactly the same end -- to wit, to enforce compliance with the effluent limitations and other discharge standards and requirements of the Water Amendments; and so, too, was the defense of the appeal in this Court, once Con Edison forced it with the filing of its notice. Under similar circumstances, the First Circuit authorized the award of attorneys' fees in an action before it under the Clean Air Act, where the applicable statutory authorization was essentially identical to that of Section 505, despite the fact that the authorization did not expressly extend to the Circuit Courts [NRDC v. EPA, 484 F.2d 1331 (1st Cir. 1973)].

The difficulties the Court faced in NRDC v. EPA, supra, are, moreover not even present here. There, the concern was with the justification for allowing an award against the United States absent express statutory authorization. Here, by contrast, recovery has been sought against Con Edison alone, because it, and not the government, forced the appeal. Such being the case, and there being no issue of government liability here, this Court may properly award attorneys' fees either in the exercise of its inherent equity powers [see Hall v. Cole, supra] or pursuant to the statutory authorization included in the Water Amendments. Indeed, in view of the language contained in the Senate Report, and in light of plaintiffs' success, we respectfully submit that the law calls for the award of fees here, if fees are ever to be allowed.

CONCLUSION

For the reasons set forth above, this petition should be granted, the ruling of September 30 reconsidered, and the award of attorneys' fees as requested by plaintiffs approved.

Dated: October 15, 1974

Respectfully submitted,

BERLE, BUTZEL & KASS
Attorneys for Plaintiffs-
Petitioners
425 Park Avenue
New York, New York 10033

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to favorable consideration of the Court and is not filed for purpose of delay.

Albert K. Butzel

Albert K. Butzel
Attorney for Plaintiffs-Petitioners

CERTIFICATE OF SERVICE

I hereby certify that that two copies of the foregoing Petition for Rehearing and Suggestion for Rehearing In Banc of Scenic Hudson Preservation Conference, et al. were served today October 15, 1974, by first class mail, properly addressed, on counsel for Con Edison and Government Appellees as follows:

Carl Hobelman, Esq.
LeBoeuf, Lamb, Leiby & MacRae
Counsel for Con Edison
One Chase Manhattan Plaza
New York, New York 10005

Paul J. Curran, Esq.
United States Attorney
Attorney for Defendant-Appellees
U.S. Courthouse
Foley Square
New York, New York 10007

Albert K. Butzel
ALBERT K. BUTZEL

Dated: October 15, 1974